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No. 97-1252

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

JANET RENO, et al.,
Petitioners,
v.
AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL IMMIGRATION LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

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STATEMENT OF INTEREST

The National Immigration Law Center (NILC) is a national legal support center dedicated to protecting the rights of low-income immigrants and their family members.[1]

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

NILC conducts trainings, produces legal publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure the fairness and constitutionality of immigration law enforcement.

NILC is filing this brief because the present case involves a jurisdictional issue — the interpretation of 8 U.S.C. § 1252(g) — that has crucial implications for the protection of the rights of immigrants. These implications extend far beyond the context of the present case, and will not be adequately addressed by the parties.

Both parties have given written consent to the filing of this brief.

SUMMARY OF ARGUMENT

This is the first case in which this Court has been asked to construe 8 U.S.C. § 1252(g), an important provision whose meaning and constitutionality are currently being litigated in the lower federal courts. An overly broad reading of Section 1252(g) would create unintended conflicts with other statutes and with basic presumptions of our constitutional system. These conflicts must be considered in deciding what kinds of "cause or claim . . . arising from" certain actions of the Attorney General are barred by Section 1252(g). If no other adequate judicial forum is available to Respondents, Section 1252(g) is susceptible to an interpretation that permits them to seek injunctive relief.

Although this case involves only the availability of judicial review *before* the entry of a final removal order, the Government's Brief uses this case as a vehicle for criticizing court of appeals decisions that preserve the availability of habeas

corpus jurisdiction in the district courts *after* entry of a deportation order, for aliens who have no other judicial remedy against unlawful removal. The Government thereby raises momentous constitutional issues beyond the scope of this case, which should be reserved until they can be adequately briefed in a case that actually presents them.

If Section 1252(g) were construed as barring the availability of habeas corpus to aliens who have no other judicial remedy to challenge the legal validity of their removal, then it would violate the Habeas Corpus Suspension Clause of the Constitution. The historical core of the writ of habeas corpus is the judicial inquiry into the lawfulness of executive detention. This Court has always understood detention of aliens for immigration enforcement purposes as within the scope of the writ, and has always preserved habeas inquiry against congressional efforts to confer finality on deportation orders.

The traditional presumption against implied repeal of the habeas corpus statute also supports the consistency of Section 1252(g) with continued habeas corpus jurisdiction in the district courts. As this Court held in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), withdrawal of habeas corpus jurisdiction will not be inferred from doubtful language.

ARGUMENT

The issue raised by the present case is whether Respondents may seek relief in district court against prospective removal before the completion of administrative removal proceedings against them. The Government contends that such relief is precluded by 8 U.S.C. § 1252(g), which provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction

> to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Under the Government's interpretation, Respondents would be required to await the entry of a final removal order and then seek judicial review under Section 1252, despite their claim that such a proceeding would not provide an adequate forum for vindication of their constitutional rights.

The Government's Brief goes further, however, and criticizes court of appeals decisions holding that district courts continue to possess jurisdiction in habeas corpus for aliens who, unlike Respondents, have no other judicial forum in which to challenge removal orders on constitutional or statutory grounds. Brief for Petitioners at 45 n.20, 25 n.12. The Government thereby invites the Court to address issues of great constitutional importance in a case where they are not actually presented and where they cannot be adequately briefed. *Amicus* respectfully submits that this case provides no proper occasion for resolving the interaction of Section 1252(g) with the habeas corpus statute, 28 U.S.C. § 2241. To clarify the importance of the constitutional issue raised by the Government's suggestions, however, *Amicus* will sketch in Part II of this brief why Section 1252(g) would be unconstitutional if it barred resort to habeas corpus. *See also Magana-Pizano v. INS,* ____ F.3d ____, 1998 WL 550111, 1998 U.S. App. Lexis 21355 (9th Cir. Sept. 1, 1998) (finding Section 1252(g) unconstitutional on assumption that it precludes employment of habeas corpus); *Goncalves v. Reno,* 144 F.3d 110 (1st Cir. 1998) (construing Section 1252(g) as consistent with Section 2241, partly to avoid constitutional objection).

I.

SECTION 1252(g) CANNOT BE READ LITERALLY, BUT MUST BE RECONCILED WITH OTHER STATUTORY PROVISIONS AND TRADITIONAL PRESUMPTIONS.

The Government's own Brief admits that Section 1252(g) cannot be read literally. Brief for the Petitioners at 30 n.15. Section 1252(g) begins "[e]xcept as provided in *this* section, and notwithstanding *any* other provision of law." (Emphasis added.) Nonetheless, the Government argues that judicial review of a final order of deportation must be available to the Respondents in accordance with former 8 U.S.C. § 1105a and the transition provisions of IIRIRA, to avoid "an anomalous result."

The Government is correct, but its concession is too narrow. The courts will need to be alert to other anomalous results that would follow from too broad or literal an interpretation of Section 1252(g). Some of these anomalies, like the one identified by the Government, may result from the interaction of Section 1252 with other provisions enacted by IIRIRA. Other anomalies may result from the interaction of Section 1252 with other statutes, or with basic constitutional assumptions.

For example, the Government suggests — at present — that Section 1252(g) should be read as precluding review of "any aspect of the removal process except in the context of a challenge to a final order of removal." Taken at face value, this interpretation would bar any review of detention for purposes of removal, even if that detention stretches on for years after the entry of the final order because the alien cannot actually be removed. *Cf. Barrera-Echavarria v. Rison,* 44 F.3d 1441 (9th Cir. 1995) (reviewing legality of continued detention of excludable alien who arrived in Mariel boatlift in 1980); *Truong v. INS,* ____ F. Supp. 2d

____, 1998 WL 466584 (E.D. Cal. Aug. 11, 1998) (reviewing legality of continued detention of resident alien after three years of unsuccessful efforts to deport him to Vietnam). Review of final removal orders must be sought within 30 days of the order, see Section 1252(b)(1), and therefore could not provide a vehicle for inquiry into subsequent detention. The Government's interpretation would also preclude any later litigation seeking a prospective remedy for unconstitutional conditions of confinement. *Cf. Reno v. Flores,* 507 U.S. 292, 301 (1993) (noting consent decree on conditions of confinement for deportable alien children); *Justiz-Cepero v. INS,* 882 F. Supp. 1582 (D. Kan. 1995) (evaluating conditions of confinement of excludable alien under due process clause).

A literal reading of Section 1252(g) would also appear to bar any damage claims, under the Federal Tort Claims Act or in a Bivens action against individual officers, for injuries unlawfully inflicted upon an alien in the course of the physical execution of a removal order, no matter how egregious the officer's misconduct. *Cf. Lynch v. Cannatella,* 810 F.2d 1363 (5th Cir. 1987) (Bivens action available for gross physical abuse in removal process); *Sanchez v. Rowe,* 651 F. Supp. 571 (N.D. Tex. 1986) (FTCA claim and Bivens action arising from abuse by Border Patrol agent). Literally, such a claim could be characterized as "any cause or claim by . . . an alien arising from the . . . action by the Attorney General to . . . execute removal orders." Instead, the courts must determine sensible limits on the phrase "any cause or claim" that would reconcile Section 1252(g) with the Federal Tort Claims Act and the presumptive availability of remedies for constitutional violations.

As these examples illustrate, Section 1252(g) does not reveal its meaning in isolation, but must be construed "alongside the remainder of the *corpus juris.*" Antonin Scalia, A Matter of Interpretation: Federal Courts and the

Law 17 (1997). If, as Respondents contend, the procedure for review of a final order would have been inadequate to vindicate their constitutional rights — a question which this brief does not address — then the superficial breadth of Section 1252(g)'s language should not prevent an interpretation that would provide them an adequate forum.

II.

THIS COURT SHOULD BE CAREFUL TO READ SECTION 1252(g) IN A MANNER THAT PRESERVES THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS

The Government's Brief expressly invites the Court's attention to the implications of Section 1252(g) for the availability of habeas review of deportation orders, an issue currently being litigated in the lower federal courts. Brief for Petitioners at 45 n.20.[2] *Amicus* agrees that this Court should construe Section 1252(g) with the awareness that later cases will raise issues regarding habeas corpus, statutory and constitutional questions of the highest significance. Contrary to the Government's view, *Amicus* suggests that this fact counsels extreme caution in the interpretation of Section 1252(g), so as not to preclude the proper resolution in a later case of issues that are not presented in the present case, and cannot be adequately briefed here.

The Government concedes that Respondents in the present case have a right to judicial review in the court of appeals of a final removal order if one is ever entered against

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[2]The Government cites four court of appeals cases. Other recent decisions include *Magana-Pizano v. INS,* ____F.3d ____, 1998 WL 550111, 1998 U.S. Lexis 21355 (9th Cir. Sept. 1, 1998); *Lee v. Reno,* ____ F. Supp. 2d ____, 1998 WL 430131 (D.D.C. July 27, 1998), and *Pak v. Reno,* ____ F. Supp. ____, 1998 WL 344969 (N.D. Ohio May 29, 1998).

them. The question of preclusion of review of a removal order, therefore, does not arise in this case. The Government bases this concession on its interpretation of Section 1252(g) as accommodating the transition review procedures of IIRIRA. Brief for Petitioners at 30-31 n.15. But there are more fundamental reasons outside IIRIRA for conceding Respondents' right to a judicial forum in the event of any future removal order.

As *Amicus* will sketch *infra,* aliens being deported from the United States are entitled to judicial inquiry into the lawfulness of their removal, including compliance with both constitutional and statutory limits on executive power, regardless of whether such inquiry is provided for by Section 1252. This entitlement arises from at least two sources: the Suspension Clause of Article I, § 9, and the traditional presumption against repeal of the courts' statutory authority to issue writs of habeas corpus under 28 U.S.C. § 2241.[3] So long as Congress provides an adequate alternative avenue of review, the alien may be required to employ that avenue, and Section 2241 remains in the background. *See United States ex rel. Tanfara v. Esperdy,* 347 F.2d 149, 152 (2d Cir. 1965) (finding petition for review adequate means of testing legality of detention under deportation order); *see also Swain v. Pressley,* 430 U.S. 372, 383-84 (1977) (similar analysis in context of postconviction relief). But where Congress does not provide an adequate alternative avenue, the entitlement to habeas corpus regains its priority.[4]

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[3]Another possibility is that this entitlement also arises directly from a proper understanding of Article III. *See* Richard H. Fallon, Jr., Applying the Suspension Clause to Immigration Cases, 98 Colum. L. Rev. 1068 (1998). *Amicus* will not elaborate this argument here.

[4]The Brief of Amici Washington Legal Foundation et al., at 19, erroneously asserts that habeas corpus jurisdiction could be removed from the lower federal courts on the theory that *this* Court would have jurisdiction to review an executive removal decision directly on an original writ of habeas corpus. That theory violates the principle of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), that this Court's original jurisdiction is limited. The grant of a writ of habeas corpus directly to an executive official, in a case that is not within the jurisdiction of any lower court, would be an impermissible exercise of original jurisdiction. *See Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 100-01 (1807).

Two recent court of appeals cases illustrate the twin bases of an alien's entitlement to habeas corpus. In *Goncalves v. Reno,* 144 F.3d 110, 118-23 (1st Cir. 1998), the First Circuit construed Section 1252(g) as preserving access to habeas corpus under Section 2241, relying on both the traditional presumption against repeal of habeas corpus jurisdiction and on the need to avoid the constitutional question that would otherwise be raised. In *Magana-Pizano v. INS,* ____ F.3d ____, 1998 WL 550111, 1998 U.S. App. Lexis 21355 (9th Cir. Sept. 1, 1998), the Ninth Circuit directly confronted the constitutional issue after an earlier panel of that court had rigidly interpreted Section 1252(g) as barring resort to habeas corpus. The Ninth Circuit concluded that, as so interpreted, Section 1252(g) violated the Suspension Clause.

A. THE CONSTITUTION GUARANTEES TO ALIENS THE RIGHT TO CHALLENGE THE LAWFULNESS OF THEIR DETENTION AND DEPORTATION BY WRIT OF HABEAS CORPUS.

The Constitution provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. The Suspension Clause prohibits not only total suspension of the writ, but also partial suspensions directed at particular persons or categories of cases. *See* Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum.

L. Rev. 961, 976-80 (1998) [hereinafter, Neuman, Habeas Corpus].

An alien's right to habeas corpus when detained for removal includes the right to raise both constitutional and statutory objections to the removal order. "The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is, the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins,* 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). It is essential to separate the application of habeas corpus to detention by order of *executive* officials from current controversies over its application as a remedy for prisoners confined after a state *court* criminal conviction. Judicial inquiry into the lawfulness of executive detention implicates the traditional core of the writ. *See Felker v. Turpin,* 518 U.S. 651, 663 (1996); *Swain v. Pressley,* 430 U.S. 372, 380 n.13 (1977); *id.* at 386 (Burger, C.J., concurring). Historically, "[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention." Developments in the Law — Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1238 (1970).[5]

This Court settled long ago that habeas corpus law applies to the review of immigration decisions. Soon after the federal government began regulating immigration, the government tried to argue that exclusion did not restrain an alien of his liberty within the meaning of habeas corpus doctrines, and this Court rejected that argument. *United*

[5] *Amicus* takes no position on the question of what the Suspension Clause may *currently* require with regard to habeas corpus review of a criminal conviction.

States v. Jung Ah Lung, 124 U.S. 621, 626 (1888); *see also In re Jung Ah Lung,* 25 F. 141, 142 (D. Cal. 1885) ("If the denial, therefore, to the petitioner of the right to land, thus converting the ship into his prison-house, to be followed by his deportation across the sea to a foreign country, be not a restraint of his liberty within the meaning of the habeas corpus act, it is not easy to conceive any case that would fall within its provisions."); *cf.* Neuman, Habeas Corpus, supra, 98 Colum. L. Rev. at 990-1004 (describing earlier uses of habeas corpus in extradition and other situations analogous to deportation).

When Congress attempted to confer finality on the decisions of immigration officers in the 1890s, this Court affirmed the alien's entitlement to a writ of habeas corpus "to ascertain whether the restraint is lawful," and limited the effect of this finality to executive findings *of fact. Nishimura Ekiu v. United States,* 142 U.S. 651, 660 (1892). Thereafter, this Court consistently preserved habeas corpus scrutiny of the lawfulness of deportation decisions against Congress's efforts to confer "finality" upon them. The Court subsequently modified its doctrine concerning finality of fact when it recognized, in light of due process requirements, that the existence of *some* evidentiary basis for the finding must be open to inquiry on habeas. *See, e.g., Chin Yow v. United States,* 208 U.S. 8 (1908); *Tang Tun v. Edsell,* 223 U.S. 673 (1912); *United States ex rel. Vajtauer v. Commissioner,* 273 U.S. 103 (1927);[6] Gerald L. Neuman, The Constitutional Requirement of "Some Evidence," 25 San

[6] Some lower courts have been confused by the emphasis on constitutional issues in this Court's opinion in *Vajtauer,* which reflected the fact that the case had been brought to this Court on direct appeal from the district court on the basis of the presence of a constitutional issue. *See Vajtauer,* 273 U.S. at 105 (citing Judicial Code § 238 as authorizing direct appeal). In that period, cases raising only statutory issues, e.g., *Gegiow v. Uhl,* 239 U.S. 3 (1915), reached this Court on certiorari from the courts of appeals.

Diego L. Rev. 631, 637-41 (1988). Of particular significance, this Court regularly employed habeas corpus to keep executive officials within the bounds of their statutory authority in exclusion and deportation, and this review encompassed non-constitutional as well as constitutional claims. *See, e.g., Gegiow v. Uhl,* 239 U.S. 3 (1915); *Mahler v. Eby,* 264 U.S. 32 (1924); *Kessler v. Strecker,* 307 U.S. 22 (1939).

The Court recounted this history in *Heikkila v. Barber,* 345 U.S. 229, 233-35 (1953), and concluded that the statutes adopted between 1891 and 1917 had precluded review "to the fullest extent possible under the Constitution." These limitations remained in force until the enactment of the Immigration and Nationality Act of 1952 made the judicial review provisions of the Administrative Procedure Act applicable to proceedings arising thereunder, unlike *Heikkila,* which was decided under the 1917 Immigration Act. *See Shaughnessy v. Pedreiro,* 349 U.S. 48 (1955).

The APA had the effect of expanding the scope of judicial authority over immigration decisions from the constitutional minimum of habeas inquiry to the full scope of APA judicial review. The Court in *Heikkila* contrasted the due process "some evidence" test with the APA test of substantial evidence on the record as a whole in explaining the difference between habeas inquiry and "judicial review." *Id.* at 236 & n.11 (citing *Vajtauer, supra,* and *Bridges v. Wixon,* 326 U.S. 135 (1945)).[7] Nor does the constitutional minimum of inquiry embrace the full scope of abuse of discretion doctrines developed under the APA. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 268 (1954).

[7]The traditional distinction between habeas inquiry and judicial review, *see* Neuman, Habeas Corpus, *supra,* 98 Colum. L. Rev. at 1002, 1010, 1019, must be kept in mind to understand the dictum, often quoted out of context, in *Carlson v. Landon,* 324 U.S. 524, 537 (1952), that "No judicial review is guaranteed by the Constitution." The Brief of Washington Legal Foundation, et al. in Support of Petitioners, at 16 n.7, quotes this sentence, suppressing with an ellipsis the sentence, "This power is, of course, subject to judicial intervention under the 'paramount law of the constitution.'" *Carlson,* 324 U.S. at 533 (quoting *Fong Yue Ting v. United States,* 149 U.S. 698, 713-15 (1893)). The passage in *Fong Yue Ting* observes that administrative officials may execute the immigration laws "except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene," evidently a reference to the Suspension Clause.

Vague references to the "sweeping authority" of Congress over immigration, see Brief for Petitioners at 40, do not override the entitlement to habeas inquiry. Congress's power over immigration does not trump all constitutional protections, and especially not guarantees of separation of powers and proper procedure. As this Court explained in *INS v. Chadha,* 462 U.S. 919 (1983), invalidating a legislative veto over discretionary relief from deportation:

> The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley v. Valeo,* "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction."

462 U.S. at 940-41 (citations omitted). Congress's broad substantive power over immigration policy has often been tempered by judicially enforceable procedural guarantees, especially in connection with deportation proceedings, in which this Court has consistently held due process norms applicable. *See, e.g., Yamataya v. Fisher,* 189 U.S. 86 (1903) (affirming procedural due process limits on deporta-

tion); *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) (emphasizing increasing constitutional protection of aliens after their entry to the United States); Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 Colum. L. Rev. 1625 (1992). Like these other constitutionally mandated procedural rights, Congress cannot deprive aliens of the privilege of the writ of habeas corpus. *See* Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1393, 1397 (1953).

Nor is there any inconsistency between the constitutional necessity for habeas inquiry into deportation decisions under the Suspension Clause and the characterization of immigration matters as suitable for executive adjudication under the "public rights" doctrine. As Justice Scalia has emphasized, the "public rights" doctrine is a historically based rule grounded on the theory of sovereign immunity. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68-70 (1989) (Scalia, J., concurring in part and concurring in the judgment). Although this Court has permitted deportation decisions to be made as an initial matter by executive officials, it has always preserved habeas corpus inquiry into the lawfulness of those decisions. There is no historical tradition of executive detention immune from habeas corpus. To the contrary, this Court's nineteenth century cases establishing the public rights doctrine assume the availability of the writ. *See* Neuman, Habeas Corpus, supra, 98 Colum. L. Rev. at 1030-31 (discussing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), and *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)).

If Section 1252(g) could not be construed as permitting judicial inquiry into the legality of deportation decisions as required by the Suspension Clause, it would be unconstitu-

tional. It would then have to be severed, as this Court has severed other unconstitutional provisions of the immigration laws. *See United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *INS v. Chadha*, 462 U.S. 919 (1983). This Court would, however, be properly reluctant to reach the constitutional issue unnecessarily. *Amicus* submits that these wider ramifications provide a further compelling reason to avoid an overly literal interpretation of Section 1252(g) in the present case.

B. SECTION 1252(g) DOES NOT EXPRESSLY REPEAL THE STATUTORY RIGHT TO HABEAS CORPUS

In addition to the principle of avoiding unconstitutional interpretations of statutes, another rule of statutory interpretation requires reconciliation of Section 1252(g) with Section 2241. As this Court observed in *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996), repeals by implication are disfavored, and a specific tradition particularly disfavors implied repeals of habeas corpus jurisdiction under 28 U.S.C. § 2241. *See Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1869) (preserving "efficacy of the writ" by rejecting "any construction giving to doubtful words the effect of withholding or abridging this jurisdiction"). Given all the other respects in which Section 1252(g)'s limitation of "cause[s] and claim[s]" needs to be construed to reconcile it with other provisions of law, it cannot be said that Section 1252(g) expressly repeals Section 2241 in the removal context. *See Goncalves v. Reno*, 144 F.3d 110, 120-22 (1st Cir. 1998) (analyzing Section 1252(g) in the context of IIRIRA and finding no language repealing Section 2241); *Jean-Baptiste v. Reno*, 144 F.3d 212, 218-19 (2d Cir. 1998).

CONCLUSION

For the foregoing reasons, this Court should reject the Government's efforts to give 8 U.S.C. § 1252(g) an overly literal interpretation, and should construe it in a manner that would ensure the Respondents an adequate judicial forum for the vindication of their constitutional rights. At the same time, the Court should construe Section 1252(g) in a fashion that would avoid the necessity of a future finding of unconstitutionality under the Suspension Clause. Assuming that judicial review after the issuance of a final removal order would not provide Respondents an adequate judicial forum — an issue this brief does not address — the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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